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CHARLES ELMORE CROPLEY
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No. 1127

In the Supreme Court of the United States

OCTOBER TERM, 1945

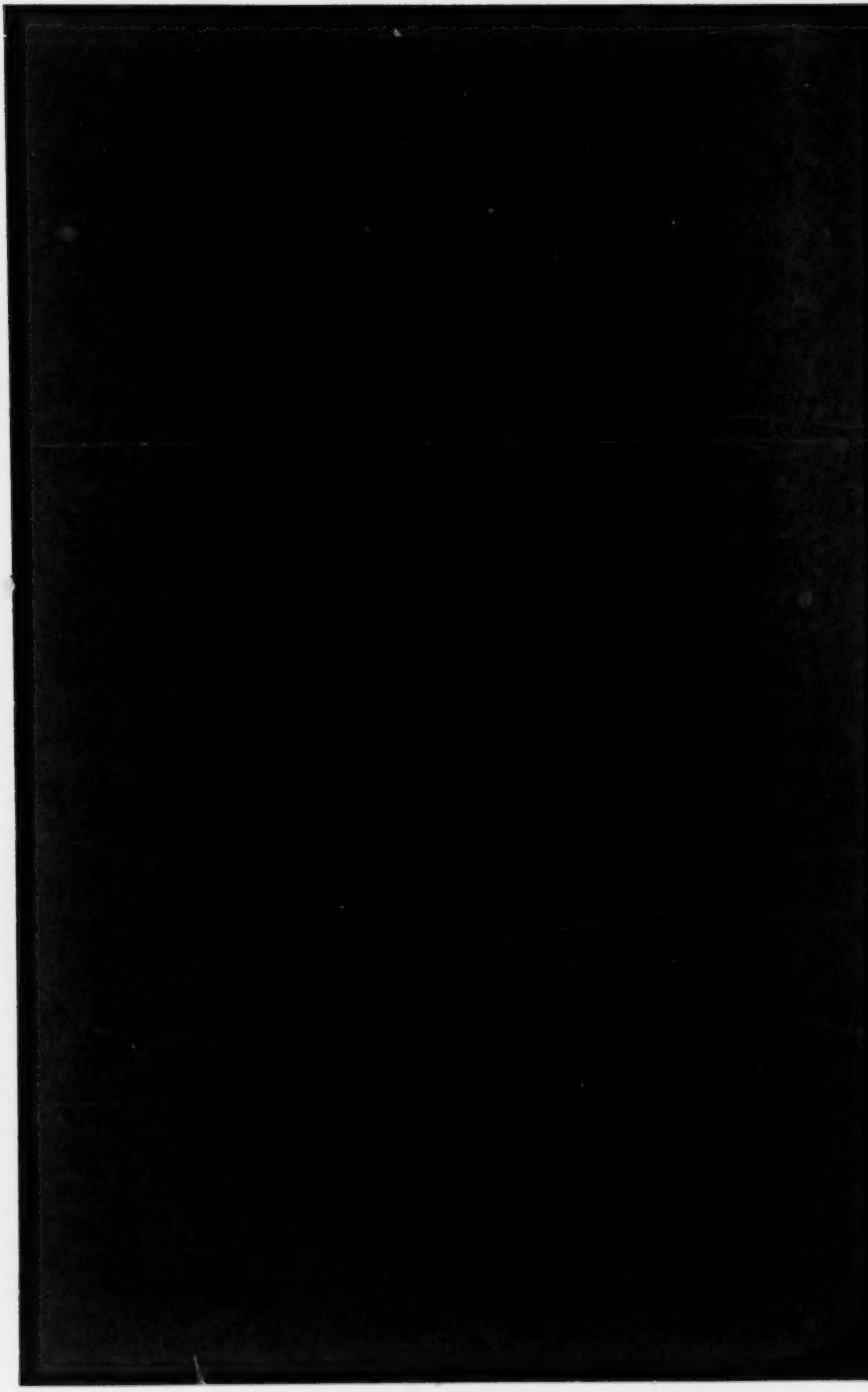
HASTINGS MANUFACTURING COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION



INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	6
Conclusion	11

CITATIONS

Cases:

Bronx Brass Foundry, Inc. v. *Irving Trust Co.*, 297 U. S. 230 — 10

Corn Products Refining Co. v. *Federal Trade Commission*, 324 U. S. 726 — 7

Fashion Originators' Guild, Inc. v. *Federal Trade Commission*, 312 U. S. 457 — 6, 7, 8, 9

Federal Trade Commission v. *Curtis Publishing Co.*, 260 U. S. 568 — 10

Federal Trade Commission v. *Keppel & Bro., Inc.*, 291 U. S. 304 — 8, 9

Ford Motor Co. v. *Federal Trade Commission*, 120 F. 2d 175, certiorari denied, 314 U. S. 668 — 9

Jones v. *Securities and Exchange Commission*, 298 U. S. 1 — 10

Warner Bros. Pictures, Inc. v. *United States*, 298 U. S. 643 — 10

Statute:

Federal Trade Commission Act, Sec. 5, as amended by Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. 45 — 2

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OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 786) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 4, 1946 (R. 785). The petition for a writ of certiorari was filed on April 17, 1946. The jurisdiction of this Court is invoked under Section 5 of the Federal Trade Commission Act as amended, c. 49, 52 Stat. 111, 15 U. S. C. 45, and Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether petitioner's practice, pursued deliberately and successfully, of obtaining agreements by jobbers to handle petitioner's product exclusively, by offering to purchase all goods of competitors owned by the agreeing jobber, to make loans to the jobber or to guarantee him higher profits, constitutes an unfair method of competition within the meaning of the Federal Trade Commission Act.

(2) Whether the Federal Trade Commission is authorized to issue a complaint under Section 5 of the Federal Trade Commission Act after having dismissed without prejudice a prior complaint making the same charges against the same respondent.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act as amended by the Act of March 21, 1938, c. 49, 52 Stat. 111, 15 U. S. C. 45, provides in part:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

This is a proceeding to review the validity of an order of the Federal Trade Commission issued under Section 5 of the Federal Trade Commission Act.[1] The Commission, prior to issuing the complaint upon which this order is based, had dismissed without prejudice an earlier complaint making the same allegations as to petitioner's violation of Section 5 (R. 7–10, 16, 57–60).

The court below, after making "a careful review and analysis of the record" in the light of petitioner's challenge of many of the Commission's findings, concluded that the findings were adequately supported by evidence (R. 790–791), and in this Court petitioner has not challenged the findings of the Commission.[2] We therefore summarize the facts in the case as found by the Commission.

Since 1923 petitioner has been manufacturing piston rings and other allied products for use as replacement parts for automobiles (R. 69–70). Both petitioner and its competitors market their

[1] The complaint issued by the Commission also charged petitioner with discriminating in price between different purchasers of its products in violation of Section 2 (a) of the Clayton Act, but the Commission, upon final hearing, dismissed this part of its complaint (R. 60–61, 83).

[2] While petitioner asserts that the Commission's findings ignore certain pertinent facts on which evidence was offered, failure to find such facts is not specified as error or included in the questions presented by the petition (Pet. 5–6, 10–11, 13–14).

rings through jobbers (R. 71). Individual jobbers handle the rings of from one to four manufacturers and the handling of two or three competing lines is not uncommon (*ibid.*). Early in 1936, after petitioner had introduced a new type of ring for which it claimed superior qualities, it began an aggressive campaign to obtain new, and so far as possible exclusive, channels of distribution, by inducing jobbers to sell petitioner's rings exclusively and to discontinue sale of whatever competing rings the jobber was then handling (R. 70, 71). As to jobbers who could not be persuaded to "go 100% Hastings", petitioner sought to obtain an understanding that the jobber would concentrate his sales effort on petitioner's rings (R. 72). Petitioner, which at the end of 1935 had about 600 jobbers and ranked sixth or seventh in volume of sales of piston rings for replacement purposes, secured in the next five years some 900 new jobbers and became the second largest seller of rings to the replacement trade (R. 70, 80).

Petitioner and its competitors customarily place rings with jobbers on consignment (R. 71). Apart from consigned stock, which is in the nature of a basic inventory, the jobber must purchase other types of rings if he wishes to handle them and it is not uncommon for a jobber to have on hand substantial quantities of rings which he has purchased outright, such rings being commonly referred to as overage (*ibid.*). Petitioner, as a

means of obtaining exclusive jobber outlets, made it a practice to offer to purchase a jobber's entire overage, regardless of the age, condition, or actual value of the rings, at the cost of the rings to the jobber (R. 72–73). Rings so purchased were shipped to petitioner's factory and there destroyed or they were destroyed locally by petitioner's representatives (R. 73). Petitioner made purchases of this kind from about 173 jobbers, at a total cost of about $281,000 for the years 1937 to 1940, inclusive (R. 76).

Petitioner also made loans to jobbers for the purpose of inducing the borrowing jobber to handle petitioner's product exclusively. In the years 1937 to 1940, inclusive, petitioner made loans to some 29 jobbers aggregating about $151,000 (R. 72, 78). In addition, petitioner sometimes guaranteed that the jobber's profit from the sale of petitioner's rings would exceed his past year's profit from the sale of other rings (R. 72). These methods—purchase of overage, loans, and profit guarantees—were used singly or in conjunction as the circumstances of the particular case seemed to require (*ibid.*). The effect of petitioner's practices has been unfairly to divert trade to petitioner, unreasonably to lessen and restrain competition in the sale of piston rings for the replacement trade, and to tend to give petitioner a monopoly of this trade (R. 81).

The Commission concluded that the foregoing practices constituted unfair methods of competition and unfair and deceptive acts and practices (R. 81). The Commission accordingly issued an order requiring petitioner to cease and desist from purchasing from any distributor his stocks of products competitive with those of petitioner, from making any loan to any distributor, and from giving distributors guarantees of increased profits when such purchase, loan or guarantee was made to induce the distributor to discontinue handling all products competitive with those of petitioner and to handle petitioner's products in lieu thereof (R. 82–83).

On review of this order, the court below held that the statute warranted the Commission's determination as to the unfairness of petitioner's methods of competition (R. 791–796). The court also held that the dismissal without prejudice of an earlier complaint against petitioner did not estop the Commission from issuing a second complaint making the same charges of violation of Section 5 of the Act (R. 786–788).

ARGUMENT

I

In *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission*, 312 U. S. 457, 463–464, this Court held that if a practice runs counter to the policy of the Clayton Act the Federal Trade

Commission has the power to suppress it as an unfair method of competition. Section 2 (a) of the Clayton Act makes it unlawful directly or indirectly to discriminate in price between different purchasers. If petitioner's jobbers had been purchasers instead of consignees, the special advantages which petitioner gave to particular jobbers by purchasing overage, making loans or giving profit guarantees would constitute indirect discriminations in price prohibited by Section 2 (a). See *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U. S. 726, 740. We submit that petitioner's practices were so closely akin to those prohibited by Section 2 (a) that they must be deemed to run counter to the policy of that Act and to be, therefore, "unfair" methods of competition within the meaning of the Federal Trade Commission Act.

But aside from the foregoing consideration, the statute clearly authorizes the determination made by the Commission in this case. Petitioner's practices had the purpose and effect of securing for it a monopoly of as many as possible of the distribution outlets which are the medium through which petitioner and its competitors market their goods, and the Commission found that the practices tended to suppress competition and to create in petitioner a monopoly of the trade in which it was engaged. In *Fashion Originators' Guild, Inc.* v. *Federal Trade Commission,* 312 U. S. 457, 464–

466, this Court held that practices which tend to monopolize trade and to narrow the outlets to which competitors can sell are within the prohibitions of the Federal Trade Commission Act. That Act was designed to have a "prophylactic effect" and to stop in their incipiency practices having a monopolistic purpose and effect (*idem.*, p. 466). In addition, the practices which the Commission found to be unfair involved giving special and variable inducements to jobbers for the purpose of depriving competitors of many of their existing channels of distribution. A method of competition which casts upon competitors the burden of loss of business "unless they will descend to a practice which they are under a powerful moral compulsion not to adopt", represents "the kind of unfairness at which the statute was aimed". *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, 313.

It should also be noted that while final decision as to whether a method of competition is "unfair" rests with the courts, "in passing on that question the determination of the Commission is of weight" and the courts should not, where the matter is doubtful, reject the Commission's conclusion. *Federal Trade Commission* v. *Keppel & Bro., Inc.*, 291 U. S. 304, 314. Congress created the Commission "with the avowed purpose of lodging the administrative functions committed to it in 'a body specially competent to deal with them by

reason of information, experience and careful study of the business and economic conditions of the industry affected.' " *Ibid.*

Petitioner contends (Pet. 13) that the Commission and the court below erroneously failed to adjudge petitioner's practices in the light of its competitive situation. The Commission did not reject evidence offered by petitioner in justification of its practices, as had been done in the *Fashion Originators' Guild* case, and the basis of petitioner's contention must be that the Commission failed to find certain facts, material to the issues, upon which conclusive evidence had been presented. Presumably the Commission did not find such facts for the reason that it was not satisfied as to the sufficiency of the evidence thereon,[3] and petitioner, in challenging the Commission's action, presents no question of law meriting review by certiorari. Furthermore, petitioner did not attack the Commission's order upon this ground in the petition for review which it filed in the court below (R. 1–6). The two cases cited by petitioner on the present point are not in any respect in conflict with the decision below.[4]

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[3] One of the headings in the Commission's brief in the court below is: "Petitioner's contention that its offer of 'obsolescence protection' was forced upon it by competitors is not supported by substantial competent evidence".

[4] *Ford Motor Co.* v. *Federal Trade Commission*, 120 F. 2d 175 (C. C. A. 6), certiorari denied, 314 U. S. 668, sustained the validity of an order of the Commission directed against

II

The Commission's dismissal without prejudice of an earlier complaint against petitioner, prior to any determination of the issues presented, could have no greater effect in barring the filing of a subsequent complaint than where the plaintiff in a civil proceeding brought in the courts obtains dismissal without prejudice of his action. Since the right of a plaintiff in court thus to dismiss his action is established, there can be no doubt that the Federal Trade Commission has a like right to dismiss its complaint without prejudice and to issue a second complaint. "The general rule is settled for the federal tribunals that a plaintiff possesses the unqualified right to dismiss his complaint at law or his bill in equity unless some plain legal prejudice will result to the defendant other than the mere prospect of a second litigation upon the subject matter." *Jones* v. *Securities and Exchange Commission,* 298 U. S. 1, 19, which held this rule applicable to administrative bodies. See also *Bronx Brass Foundry, Inc.* v. *Irving Trust Co.,* 297 U. S. 230, 232; *Warner Bros. Pictures, Inc.* v. *United States,* 298 U. S. 643.

The provisions of the statute and of the Commission's Rules of Practice cited by petitioner

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unfair methods of competition. *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568, set aside an order of this kind upon the ground that the facts as found by the Commission did not warrant its order.

(Pet. 15–16) are irrelevant. The former relates to proceedings following issuance of an order of the Commission and the latter deals with the reopening of a complaint which the Commission has dismissed, not with the issuance by it of a new complaint.[5]

CONCLUSION

The decision below is correct and there is no conflict of decisions. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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CHARLES H. WESTON,
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Assistant Chief Counsel,
Federal Trade Commission.

MAY 1946.

[5] The second complaint was broader than the first since the second complaint, but not the first, charged petitioner with violating Section 2 (a) of the Clayton Act (R. 7–12, 60–61).

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